

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MAURICE ANTHONY BROWN,

Plaintiff,

v.

KELLY FITZGERALD,

Defendant.

Case No. 3:23-cv-05851-TMC

ORDER GRANTING MOTION TO  
DISMISS

Pro se Plaintiff Maurice Anthony Brown sued Defendant Kelly Fitzgerald, an Assistant Attorney General for the State of Washington, based on actions AAG Fitzgerald took as defense counsel in a separate civil case brought by Mr. Brown. Before the Court is Defendant's motion to dismiss. Dkt. 18. Because AAG Fitzgerald has either absolute or qualified immunity from suit, the court GRANTS the motion and DISMISSES this case with prejudice.

**I. BACKGROUND**

Mr. Brown is a citizen of Florida who brings this suit pro se against Assistant Attorney General Kelly Fitzgerald. Dkt. 12. AAG Fitzgerald is counsel for the defendants in a different civil suit brought by Mr. Brown in this district. *See Brown v. Michaelis et al.*, No. 2:22-cv-00828-LK-GJL (W.D. Wash.). Mr. Brown filed this lawsuit on September 20, 2023 against AAG Fitzgerald and Attorney General Bob Ferguson. Dkt. 1. On December 20, 2023, based on

1 its own review of the complaint under 28 U.S.C. § 1915, the Court dismissed Mr. Brown's  
 2 claims against AG Ferguson and his claims against AAG Fitzgerald in her official capacity with  
 3 prejudice. Dkt. 9. The Court allowed Mr. Brown leave to amend his claims against  
 4 AAG Fitzgerald in her personal capacity. *Id.* Mr. Brown amended his complaint on January 8,  
 5 2024. *See* Dkt. 10, 11, 12.

6 Mr. Brown's amended complaint alleges that AAG Fitzgerald violated the Fourth, Fifth,  
 7 Eighth, Ninth, and Fourteenth Amendments to the U.S. Constitution; the Racketeer Influenced  
 8 and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68; and the Freedom of Information  
 9 Act, 5 U.S.C. § 552. Dkt. 12 at 3. Mr. Brown writes that "Fitzgerald did prohibit my rights from  
 10 being adjudicated by not making available pertinent documents as requested. Fitzgerald admitted  
 11 to me on the phone that they withheld documents and I wouldn't get justice because a judge  
 12 already made a decision." Dkt. 12 at 5. Mr. Brown's motion for leave to amend his complaint  
 13 asked the Court to also incorporate "the complaint filed on September 20<sup>th</sup> 2023 as 'additional  
 14 pages' for purposes of an official statement of the facts." Dkt. 10 at 1. In that document,  
 15 Mr. Brown made the following factual allegations against AAG Fitzgerald:

- 16 • "[O]n August 10, 2023 the assistant attorney general Kelly A Fitzgerald informed me  
 17 that a judge has made a ruling on the tort claim that I've filed with the District Court  
 18 and that the judges decision on having 44 pages of P-33049 public disclosure page  
 19 unredacted was in fact denied. Assistant Attorney General Fitzgerald is as deceptive, I  
 20 never filed any motion on tort claim No 3101010497 in any district court, nor did any  
 21 district court judge make any ruling . . . ." Dkt. 6 at 1–2.
- 22 • "Ms. Fitzgerald began her deception, lying to me in late April early May 2023, where  
 23 I called her on tort claims No 310101497, 3101007360, 7358 where she informed me  
 24 she knew absolutely nothing of her office having [them] . . . ." *Id.* at 2.
- "Assistant Attorney Fitzgerald . . . lied, they tampered and withheld evidence, while  
 crucial in my 2:22-CV-00828-LK-JRC ongoing cases." *Id.*
- "[T]his assistan[t] attorney general office have stolen my tort claims to hide, alter to  
 favor the outcome for department of corrections, while making themselves witnesses  
 in the very DOC case they were supposed to defend . . . ." *Id.*

Although Mr. Brown’s allegations are difficult to discern, read as a whole, his filings seem to allege that AAG Fitzgerald withheld copies of previous tort claims he filed that he requested from her and contends are evidence in his other civil case. AAG Fitzgerald moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing she is entitled to absolute or qualified immunity and that Mr. Brown has failed to state a claim on which relief may be granted. For the reasons explained below, the Court GRANTS the motion.

## II. DISCUSSION

### A. Legal Standards

#### 1. Rule 12(b)(1) Motion to Dismiss

A Rule 12(b)(1) motion seeks dismissal of a claim for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Such challenges may be either “facial” or “factual.” “A ‘facial’ attack accepts the truth of the plaintiff’s allegations but asserts that they ‘are insufficient on their face to invoke federal jurisdiction.’” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). “A ‘factual’ attack, by contrast, contests the truth of the plaintiff’s factual allegations, usually by introducing evidence outside the pleadings.” *Id.* Where, as here, the Court responds to a facial attack, the Court will resolve the challenge “as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Id.*

#### 2. Rule 12(b)(6) Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Under Federal Rule of Civil Procedure 12(b)(6), the Court may dismiss a complaint for “failure to state a claim upon

1 which relief can be granted.” Rule 12(b)(6) motions may be based on either the lack of a  
2 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
3 *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citation  
4 omitted).

5 To survive a Rule 12(b)(6) motion, the complaint “does not need detailed factual  
6 allegations,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), but “must contain sufficient  
7 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Boquist v.*  
8 *Courtney*, 32 F.4th 764, 773 (9th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
9 (2009)). “A claim is facially plausible ‘when the plaintiff pleads factual content that allows the  
10 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’”  
11 *Id.* (quoting *Iqbal*, 556 U.S. at 678). “[A] plaintiff’s obligation to provide the grounds of his  
12 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the  
13 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotation marks  
14 omitted).

15 The Court “must accept as true all factual allegations in the complaint and draw all  
16 reasonable inferences in favor of the nonmoving party.” *Retail Prop. Tr. v. United Bhd. of*  
17 *Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). But the Court is “not bound to  
18 accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555.  
19 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
20 statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

21 **B. Ninth Circuit law is unsettled on whether AAG Fitzgerald is entitled to absolute**  
22 **immunity.**

23 AAG Fitzgerald first argues she is entitled to absolute immunity because Mr. Brown has  
24 sued her for actions taken as government defense counsel in a separate civil lawsuit. *See* Dkt. 18

1 at 5–6. She relies on *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991), in which the Ninth Circuit  
2 stated broadly that “[w]hether the government attorney is representing the plaintiff or the  
3 defendant, or is conducting a civil trial, criminal prosecution or an agency hearing,” she is  
4 entitled to absolute immunity “[i]f the government attorney is performing acts intimately  
5 associated with the judicial phase of the litigation.” *Id.* at 837 (internal quotation marks omitted).  
6 AAG Fitzgerald’s conduct in responding to Mr. Brown’s request for documents while defending  
7 government actors in civil litigation would fall within this broad definition, and following *Fry*,  
8 other courts in this District applied it to grant absolute immunity to government attorneys  
9 defending civil cases. *See, e.g., Kim v. Stahman*, No. CV-10-0213-RHW, 2010 WL 1655606, at  
10 \*3 (W.D. Wash. Apr. 19, 2010) (granting absolute immunity to AUSA for “tactical decisions and  
11 procedural motions” while defending civil litigation).

12 But in *Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013), while not overruling *Fry*, the  
13 Ninth Circuit backed away from *Fry*’s broad language and limited its scope. In *Stapley*, the  
14 Ninth Circuit reiterated that “the functional nature of the activities being performed, not the  
15 status of the person performing them, is the key to whether absolute immunity attaches.” *Id.* at  
16 810 (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)). It explained that *Fry* was limited to  
17 the context of “suits brought against government attorneys who had brought civil tax  
18 enforcement proceedings,” that “the scope of immunity for other types of civil suits was not at  
19 issue,” and that the Supreme Court “has never stated that government attorneys receive absolute  
20 immunity for all litigation-related conduct, even in criminal cases.” *Id.* at 810–11. To analyze the  
21 defendants’ claim in *Stapley* of absolute immunity from “claims arising out of their initiation of  
22 [a] civil RICO suit,” the Ninth Circuit examined whether their actions were sufficiently  
23 “analogous to those of a prosecutor” and concluded they were not. *Id.* at 811–12. The court noted  
24 that the defendants were “in the same position as private lawyers” and “did not act in a uniquely

1 governmental role,” in contrast to absolute immunity cases where “the government attorney was  
2 taking action that only a legal representative of the government could take.” *Id.*

3 Under *Stapley*, AAG Fitzgerald’s actions defending her government clients are arguably  
4 more analogous to that of a private defense attorney than a prosecutor, counseling against the  
5 extension of absolute immunity. But even after *Stapley*, the Ninth Circuit has upheld (in an  
6 unpublished decision) the application of absolute immunity to government attorneys defending  
7 civil cases based on *Fry*. See, e.g., *Ray v. Jefferson*, 707 F. App’x 885, 885 (9th Cir. 2017). In  
8 *Ray*, the pro se plaintiff had sued municipal attorneys “based on their handling of his prior civil  
9 rights action . . . and their representation of the Defendants in that action,” including allegedly  
10 making a “fraudulent motion for summary judgment.” *Ray v. Jefferson*, No. 16-cv-02652-YGR  
11 (PR), 2017 WL 7726700, at \*1 (N.D. Cal. Apr. 27, 2017). The Ninth Circuit affirmed the District  
12 Court’s application of absolute immunity because the plaintiff “failed to allege facts sufficient to  
13 show that Jefferson’s actions were not ‘intimately associated with the judicial phase of  
14 litigation.’” 707 F. App’x at 885 (quoting *Fry*, 939 F.2d at 837). Neither the District Court nor  
15 the Ninth Circuit in *Ray* addressed *Stapley*.

16 Based on the decision in *Ray*, this Court concludes that it is likely—but far from  
17 certain—that AAG Fitzgerald is entitled to absolute immunity because Mr. Brown’s claims are  
18 based on her responses to his requests for records while defending government clients in civil  
19 litigation, acts “intimately associated with the judicial phase of litigation.” *Fry*, 939 F.2d at 837.

20 **C. AAG Fitzgerald is entitled to qualified immunity.**

21 But even if AAG Fitzgerald is not protected by absolute immunity, the claims against her  
22 must still be dismissed based on qualified immunity. “Qualified immunity shields government  
23 officials from civil damages liability unless the official violated a statutory or constitutional right  
24 that was clearly established at the time of the challenged conduct.” *Reichle v. Howards*, 566 U.S.

1 658, 664 (2012). “To be clearly established, a right must be sufficiently clear that every  
2 reasonable official would have understood that what he is doing violates that right.” *Id.* (cleaned  
3 up). Although the qualified immunity doctrine does not “require a case directly on point” to  
4 show that a right is clearly established, “existing precedent must have placed the statutory or  
5 constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

6 Mr. Brown has not cited, and this Court has not found, any existing precedent  
7 demonstrating that the allegations against AAG Fitzgerald, taken as true, violate Mr. Brown’s  
8 clearly established statutory or constitutional rights. *See Clairmont v. Sound Mental Health*, 632  
9 F.3d 1091, 1109 (9th Cir. 2011) (“The plaintiff bears the burden to show that the contours of the  
10 right were clearly established.”). Mr. Brown alleges that AAG Fitzgerald withheld documents he  
11 requested from her that are relevant to another civil case in which AAG Fitzgerald is defense  
12 counsel. This is a dispute that should be resolved through discovery motions in that civil case,  
13 not new claims under Section 1983. There is no caselaw clearly establishing that AAG  
14 Fitzgerald’s alleged actions violate the Fourth, Fifth, Eighth, Ninth, or Fourteenth Amendments,  
15 or the RICO Act.<sup>1</sup> AAG Fitzgerald is entitled to qualified immunity and the Court dismisses  
16 these claims with prejudice.

17 **D. Mr. Brown has not sufficiently alleged a FOIA violation.**

18 Mr. Brown also contends that AAG Fitzgerald’s actions violate the federal Freedom of  
19 Information Act (FOIA), 5 U.S.C. § 552. But AAG Fitzgerald works for a state agency, not a  
20 federal one, and FOIA claims may be brought only against federal agencies, not individuals.

---

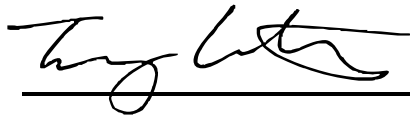
21  
22  
23 <sup>1</sup> Although the Ninth Circuit has not directly addressed the question, several district courts and  
24 other circuits have concluded that qualified immunity may be asserted as a defense to RICO  
claims. *See Smolek v. Sagar*, No. CV074878CASPLAX, 2008 WL 11424200, at \*8 (C.D. Cal.  
Apr. 7, 2008) (collecting cases).

1 *Drake v. Obama*, 664 F.3d 774, 785–86 (9th Cir. 2011). Mr. Brown’s FOIA claims against AAG  
2 Fitzgerald must also be dismissed.

3 **III. CONCLUSION**

4 For the reasons explained above, AAG Fitzgerald is entitled to either absolute or  
5 qualified immunity for Mr. Brown’s constitutional and RICO claims, and there is no private right  
6 of action against an individual for alleged FOIA violations. The Court therefore GRANTS  
7 Defendant’s motion to dismiss (Dkt. 18) and DISMISSES Mr. Brown’s complaint with  
8 prejudice. The Clerk is directed to enter judgment in favor of Defendants and close the case.

9  
10 Dated this 1st day of August, 2024.

11   
12 \_\_\_\_\_  
13 Tiffany M. Cartwright  
14 United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24